IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION This Document Relates to: ALL ACTIONS AGAINST ELECTRONIC COMMUNICATION SERVICE PROVIDERS (including all *AT&T, MCI/Verizon, Sprint/Nextel BellSouth, Cingular /AT&T Mobility* Defendants; Master Consolidated Complaints (Dkts. 124, 125, 126, 455) (*See List on Caption to Motion*)	MDL Dkt. No. 06-1791-VRW PUBLIC CERTIFICATION OF THE ATTORNEY GENERAL OF THE UNITED STATES Date: December 2, 2008 Time: 10:00 a.m. Courtroom: 6, 17th Floor Chief Judge Vaughn R. Walker

I, Michael B. Mukasey, hereby state and declare as follows pursuant to 28 U.S.C. § 1746:

1. I am the Attorney General of the United States and have held this office since November 9, 2007. The purpose of this declaration is to make the certification authorized by Section 201 of Title II of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261 ("FISA Act of 2008" or "Act"), which establishes statutory protections for electronic communication service providers ("providers") in civil actions alleging that they have furnished assistance to an element of the intelligence community. Section 802 of Title VIII of the FISA, as amended, now provides that "a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court of the United States in which such action is pending" that either:

> (1) any assistance by that person was provided pursuant to an order of the Foreign Intelligence Surveillance Court ("FISC" or "FISA Court") directing such assistance; or
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> (2) any assistance by that person was provided pursuant to a certification in writing under Sections 2511(2)(a)(ii)(B) or 2709(b) of Title 18; or

(3) any assistance by that person was provided pursuant to a directive or directives issued pursuant to the Protect America Act ("PAA") or the FISA Act of 2008; or

(4) in the case of a "covered civil action" (which is defined under the Act as an action alleging that a provider-defendant furnished assistance to an element of the intelligence community and seeks monetary or other relief from the provider related to that assistance, *see* 50 U.S.C. § 1885(5)) the assistance alleged to have been provided by the electronic communications service provider was—

(A) in connection with an intelligence activity involving communications that was—

(i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(ii) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the [provider] indicating that the activity was

(i) authorized by the President; and

(ii) determined to be lawful; or

(5) the person did not provide the alleged assistance.

See 50 U.S.C. § 1885a(a)(1)-(5). "Assistance" is defined to mean "the provision of, or the provision of access to, information (including communication contents, communication records, or other information relating to a customer or communication), facilities, or another form of assistance." *See* 50 U.S.C. § 1885(1).

2. As set forth below, and as described in more detail in my accompanying classified certification, I hereby certify that the claims asserted in the civil actions pending in these consolidated proceedings brought against electronic communication service providers fall within at least one provision contained in Section 802(a) of the FISA. In addition, as also set forth below and in my accompanying classified certification, I have concluded that disclosure of my classified certification, including the basis for my certification as to particular provider-defendants, would cause exceptional harm to the national security of the United States and, pursuant to Section 802(c)(1) of the FISA, must therefore be reviewed *in camera, ex parte* by

the Court. *See* 50 U.S.C. § 1885a(c)(1).

3. The statements made herein and in my classified certification are based on my personal knowledge and information made available to me in the course of my official duties, including the information set forth below and in my classified certification and any "supplemental materials" that may accompany my classified certification as defined in Section 802(b)(2) of the FISA, *see* 50 U.S.C. § 1885a(b)(2). I have also met with officials of the National Security Agency ("NSA") to discuss this matter, and during these meetings I have confirmed with these NSA officials that the statements herein and in my classified certification are true and accurate and have been verified with the NSA. In addition, I have reviewed the classified declarations submitted for *in camera, ex parte* review by the Director of National Intelligence ("DNI") and the Director of the NSA in *Hepting et al. v. AT&T et al.* (06-cv-00672-VRW) (hereafter the *Hepting* action) and in the actions brought against the *MCI/Verizon* Defendants (MDL 06-cv-1791-VRW) (hereafter the *MCI/Verizon* actions). I have also reviewed the Court's decision in the *Hepting* action, which denied motions to dismiss brought by the United States and the AT&T Defendants in that case. *See Hepting et al. v. AT&T et al.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006). I have also reviewed the First Amended Complaint in the *Hepting* action (hereafter "*Hepting* FAC") and the consolidated complaints against the: (i) *MCI/Verizon* Defendants (Dkt. 125); (ii) *Sprint/Nextel* Defendants (Dkt. 124); (iii) *BellSouth* Defendants (Dkt. 126) and *AT&T Mobility/Cingular Wireless* Defendants (Dkt. 455) (hereafter the "*Verizon*," "*Sprint*," "*BellSouth*," and "*Cingular*" Complaints).[1]

[1] ***Dismissed Defendants:*** I am advised that all of the provider-defendants in a fifth consolidated master complaint (Dkt. 123) have now been dismissed by stipulation and, accordingly, I need not provide a certification as to these defendants (T-Mobile, Comcast Telecommunications, McLeod USA Telecommunications Services, and Transworld Network Corp.). *See* Dkts. 162, 164, 184, 185. In addition, a number of Verizon entities have been dismissed by stipulation and, therefore, I need not provide a certification as to these entities. *See* Dkt. No. 230 (dismissing Cellco Partnership dba Verizon Wireless; NYNEX Corp.; GTE Wireless Inc.; GTE Wireless of the South, Inc; NYNEX PCS Inc.; Verizon Wireless of the East LP; Verizon Internet Services Inc.; Bell Atlantic Entertainment and Information Services Group; Verizon Internet Solutions Inc.; Verizon Technology Corp.; and Verizon Advanced

I. Summary of Allegations

4. The allegations raised in these consolidated proceedings against the provider-defendants are substantially similar to the allegations first raised in the *Hepting* action against AT&T Defendants. *See Hepting*, 439 F. Supp. 2d at 996 (summarizing allegations). First, plaintiffs allege that, following the terrorist attacks of September 11, 2001, the provider-defendants assisted the NSA in dragnet collection of the **content** of "millions of communications made or received by people inside the United States" for the purpose of analyzing those communications through key word searches to obtain information about possible terrorist attacks. *See Hepting* FAC ¶ 39; *Verizon* Compl. ¶ 165; *BellSouth* Compl. ¶ 64; *Cingular* Compl. ¶ 53; *Sprint* Compl. ¶ 44. Second, plaintiffs also allege that the provider-defendants assisted the NSA by divulging to the NSA **records** concerning the plaintiffs' telephone and electronic communications or by providing the NSA with access to databases containing such records. *See Hepting* FAC ¶¶ 51-63; *Verizon* Compl. ¶¶ 168-71, 174-75; *Sprint* Compl. ¶¶ 48-50, 53-54; *BellSouth* Compl. ¶¶ 68-70, 73-74; *Cingular* Compl. ¶¶ 57-59, 62-63. Plaintiffs allege that the foregoing assistance and activities were undertaken without judicial authorization and in violation of federal statutory provisions and the First and Fourth Amendments to the Constitution (as well as various state law and constitutional provisions). *See Hepting* FAC ¶¶ 2, 81, 83, 90-149; *Verizon* Compl. ¶¶ 177, 201-89; *Sprint* Compl. ¶¶ 56, 72-141; *BellSouth* Compl. ¶¶ 76, 101-216; *Cingular* Compl. ¶¶ 65, 90-321. In sum, plaintiffs allege that the provider-defendants furnished "assistance" (as defined in Section 801(1) of the FISA) to the Government in form of: (1) the alleged content-dragnet; and (2) the alleged collection of records about telephone and electronic communications.

Data, Inc.). Other dismissed defendants as to which I need not provide a certification are: Bright House Networks, LLC (*see* Dkt. 169); Charter Communications LLC (*see* Dkt. 170); TDS Communications Solutions, Inc. (*see* Dkt. 85); and Embarq Corporation (*see* Dkt. 235).

II. Summary of Certification

5. As set forth below, this public certification addresses the allegations raised by the plaintiffs that the provider-defendants assisted the Government with respect to: (i) the alleged content-dragnet; and (ii) to the extent it may be at issue, the interception of content under the Terrorist Surveillance Program; and (iii) the alleged provision of communication records.

A. Content Surveillance Allegations

1. *Content-Dragnet Allegations*

6. First, the plaintiffs have alleged a content surveillance program of "far greater scope" than the post-9/11 program confirmed by the President—called the "Terrorist Surveillance Program" ("TSP")—in which the President authorized the NSA to intercept certain "one-end" international communications to or from the United States that the Government reasonably believed involved a member or agent of al Qaeda or affiliated terrorist organization. *See Hepting*, 439 F. Supp. 2d at 994. While confirming the existence of the TSP, the Government has denied the existence of the alleged dragnet collection on the content of plaintiffs' communications. *See id.* at 996; *see also* Public Declaration of Lt. Gen. Keith Alexander, Director of the National Security Agency, in the *Verizon/MCI* Actions (Dkt. 254) ¶ 17. As set forth below and in my classified certification, specific information demonstrating that the alleged content dragnet has not occurred cannot be disclosed on the public record without causing exceptional harm to national security. However, because there was no such alleged content-dragnet, no provider participated in that alleged activity. Each of the provider-defendants is therefore entitled to statutory protection with respect to claims based on this allegation pursuant to Section 802(a)(5) of the FISA, *see* 50 U.S.C. § 1885a(a)(5).

2. *Terrorist Surveillance Program*

7. Second, while the plaintiffs do not appear to challenge the provider-defendants' alleged assistance to the NSA in the conduct of the publicly acknowledged TSP, my certification nonetheless also encompasses whether or not any provider-defendant assisted the NSA with that activity. Specifically, I certify with respect to any assistance with the TSP that

the provider-defendants are entitled to statutory protection based on at least one of the provisions contained in Section 802(a)(1) to (5) of the FISA, which includes the possibility that a provider defendant did not provide any assistance. *See* 50 U.S.C. § 1885a(a)(1)-(5). As set forth below and in my classified certification, disclosure of the basis for my certification with respect to any alleged assistance furnished by particular provider-defendants under the TSP would cause exceptional harm to national security and is therefore encompassed within my classified certification submitted for *ex parte*, *in camera* review pursuant to Section 802(c)(1) of the FISA, 50 U.S.C. § 1885a(c)(1).

B. Communication Records Allegations

8. Third, my certification also encompasses whether or not any provider defendant assisted the NSA through the provision of records concerning telephone and electronic communications. In particular, I certify that the provider-defendants are entitled to statutory protection based on at least one of the provisions contained in Section 802(a)(1) to (5) of the FISA, which includes the possibility that a provider defendant did not provide any assistance. *See* 50 U.S.C. § 1885a(a)(1)-(5). As set forth below, disclosure of the basis for my certification with respect to any alleged assistance furnished by particular provider-defendants to the NSA concerning the communication records allegations would cause exceptional harm to national security and is therefore encompassed within my classified certification submitted for *ex parte*, *in camera* review pursuant to Section 802(c)(1) of the FISA, 50 U.S.C. § 1885a(c)(1).

III. Harm to National Security From Disclosure of Classified Certification.

9. Section 802(c)(1) of the FISA, as amended, provides that if the Attorney General attests in a declaration that disclosure of a certification under Section 802 of the Act, or any supplemental materials submitted therewith (if any), would harm the national security of the United States, the Court shall review the certification *ex parte*, and *in camera*. *See* 50 U.S.C. § 1885a(c)(1). I hereby make the declaration required by this provision with respect to the contents of my classified certification. In sum, I have determined that disclosure of my classified certification, including the basis of my certification for particular provider

defendants, would cause exceptional harm to the national security of the United States. I concur with the judgment of the Director of National Intelligence and the Director of the NSA previously set forth for the Court in their classified declarations (referenced above), as well as with the conclusion of the Senate Select Committee on Intelligence, that disclosure of the identities of persons alleged to have provided assistance to the Government on intelligence matters, as well as disclosure of activities in which the Government is alleged to have been engaged, and the details of such activities, are properly protected as intelligence sources and methods. *See* S. Rep. No. 110-209, at 10 (2007), Report of the Senate Select Committee on Intelligence to accompany S. 2248, Foreign Intelligence Surveillance Act of 1978 Amendments of 2007. (Exhibit No. 1 to United States' Motion to Dismiss or for Summary Judgment).

Conclusion

10. For the foregoing reasons, and those set forth in my classified certification, pursuant to Section 802(a) of the FISA, I hereby certify that the claims asserted in the civil actions pending in these consolidated proceedings against the electronic communication service provider-defendants fall within at least one provision contained in Section 802(a)(1)-(5) of the FISA that would entitle these defendants to statutory protection from the pending civil actions. *See* 50 U.S.C. § 1885a(a)(1)-(5). In addition, pursuant to Section 802(c)(1) of the FISA, I have concluded that disclosure of my classified certification, including the basis for the certification as to particular provider-defendants, would cause exceptional harm to national security for the reasons set forth in that certification and must therefore be reviewed *in camera, ex parte* by the Court. *See* 50 U.S.C. § 1885a(c)(1).

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 7/19/08 [signature]

MICHAEL B. MUKASEY
Attorney General of the United States